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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KENJI KATO,

Petitioner,

v.

THE SUPERIOR COURT OF ORANGE  
COUNTY,

Respondent;

LEVEL 7, LLC, et al.,

Real Parties in Interest.

G040272

(Super. Ct. No. 06CC11891)

O P I N I O N

Original proceedings; petition for writ of mandate to challenge an order of the Superior Court of Orange County, Randell L. Wilkinson, Judge. Petition granted in part and denied in part. Petitioner's request for judicial notice. Granted in part and denied in part. Real Parties in Interest's request for judicial notice. Granted.

Law Office of Joseph M. Kar and Joseph M. Kar for Petitioner.

No appearance for Respondent.

Musick, Peeler & Garrett and Thomas J. Eastmond for Real Parties in Interest.

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#### INTRODUCTION

The trial court denied defendant Kenji Kato's motion for prevailing party attorney fees and costs following the voluntary dismissal of the case brought against him by plaintiffs Level 7, LLC, and The Management Company, LLC. We construe Kato's purported appeal from the order denying prevailing party attorney fees and costs as a petition for writ of mandate.

We grant Kato's petition in part and deny it in part. Contractual prevailing party attorney fees are not available under Civil Code section 1717, subdivision (b)(2), following the voluntary dismissal of claims on a contract. Plaintiffs' claims for declaratory relief and injunctive relief were claims on the contract. The trial court, therefore, properly refused to award Kato prevailing party attorney fees under section 1717, subdivision (b)(2). The record does not show any other basis for awarding Kato such fees.

The trial court, however, also denied Kato prevailing party court costs (not including attorney fees) which were available to him under Code of Civil Procedure section 1032, subdivision (b). We therefore issue a peremptory writ of mandate, directing the trial court to award costs, not including attorney fees, accordingly.

#### BACKGROUND

In November 2006, plaintiffs filed a complaint in Orange County Superior Court against Kato seeking declaratory relief and an injunction (Orange County action). The complaint alleged that, on March 16, 2005, Kato entered into two independent contractor agreements (the agreements)—one with each of the plaintiffs. Under the

agreements, Kato “agreed to provide business development, management, production, and consulting services” and agreed to the terms of a contractor confidentiality policy.<sup>1</sup> The contractor confidentiality policies each contained a prevailing-party attorney fees provision stating: “In the event of any action or proceeding hereunder, the prevailing party shall be entitled to reimbursement for its costs, including attorneys’ fees.”

In the first cause of action in the complaint, plaintiffs sought a declaration of their rights and obligations under the agreements because the parties disputed whether the agreements (and the attached contractor confidentiality policies) are enforceable and binding, and whether Kato is entitled to any further compensation or reimbursement under them. In the second cause of action, plaintiffs sought an injunction prohibiting Kato from disclosing matters covered by the contractor confidentiality policies. Plaintiffs successfully moved to have their claims sent to arbitration before the American Arbitration Association pursuant to the arbitration clauses contained in the agreements.

In November 2006, Kato filed a complaint in Los Angeles County Superior Court, alleging claims against plaintiffs, Nicholas, and others for breach of oral contract, abuse of process, malicious prosecution, and intentional infliction of emotional distress; Kato amended the complaint to include a claim for slander per se. In February 2008, plaintiffs submitted a request for dismissal of the entire Orange County action without prejudice. The court clerk entered dismissal as requested on February 8, 2008.

Kato filed a motion for costs and attorney fees pursuant to Code of Civil Procedure sections 1021 and 1032, and Civil Code section 1717. Kato argued that, “without warning or prior indication whatsoever, and just before Dr. Henry T. Nicholas,

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<sup>1</sup> In the opening brief, Kato stated that he performed services as “the former executive assistant, bodyguard, and basically jack-of-all-professions” for former Broadcom chief executive officer, Dr. Henry T. Nicholas, and that he worked directly for Nicholas “despite the outward appearances of corporate entities.”

III was to be deposed,” plaintiffs served their request for dismissal of the entire Orange County action on Kato. Kato claimed \$174,062.76 in “costs and fees.”

The trial court denied Kato’s motion for costs and attorney fees in a minute order which stated in relevant part: “The Court, having taken the above-entitled matter under submission on March 19, 2008, now makes the following ruling: [Kato]’s motion for costs and attorney fees is denied. [¶] The court finds that there is no prevailing party in this action per [Civil Code section] 1717[, subdivision ](b)(2). The court further finds that it is not entirely clear that the court even has jurisdiction to rule on this motion given that the court previously granted plaintiff’s motion to compel arbitration and stay proceedings.”

Kato filed a notice of appeal. Our record shows the court clerk entered dismissal of plaintiffs’ complaint on February 8, 2008, and the trial court denied Kato’s motion for prevailing party attorney fees and costs on March 20, 2008. Although no party has raised this issue, our record does not show Kato has appealed from an appealable order or judgment. We exercise our discretion to treat the purported appeal as a petition for writ of mandate. (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 745-747; *Connell v. Superior Court* (1997) 59 Cal.App.4th 382, 393-394.)

#### REQUESTS FOR JUDICIAL NOTICE

Kato filed requests that this court take judicial notice of the following: (1) a copy of the trial court’s March 20, 2008 order denying Kato’s motion for attorney fees and costs; (2) plaintiffs’ reply to the opposition to the motion to coordinate the actions, filed in Orange County Superior Court; (3) copies of two indictments, each naming Nicholas as a defendant, filed on June 4, 2008 in the United States District Court for the Central District of California, Southern Division; (4) “[a] true and correct copy of You Tube videos (media materials) previously attached as Exhibit 9 to Mr. Kato’s motion

for an order to impose fees, costs, and expenses”; and (5) four newspaper articles about Nicholas, dating from July 2007 through June 2008.

Plaintiffs filed a request that this court take judicial notice of the Los Angeles County Superior Court records in *Kato v. Nicholas*, case No. BC362424.

No party has objected to any request for judicial notice filed in this court.

We take judicial notice of the records of the Orange County Superior Court, the Los Angeles County Superior Court, and the United States District Court as requested by the parties under Evidence Code sections 452, subdivision (d)(1) and 459, subdivision (a), which includes exhibits attached to filed documents. We deny Kato’s request that we take judicial notice of the newspaper articles referenced in his request.

## DISCUSSION

### I.

#### *The Trial Court Did Not Err by Denying Kato’s Motion for Prevailing Party Attorney Fees.*

Kato contends the trial court erred by denying him prevailing party attorney fees under Civil Code section 1717, and sections 1021 and 1032 of the Code of Civil Procedure, pursuant to the prevailing-party attorney fees provision contained in the agreements. For reasons we will discuss, the trial court did not err.

Civil Code section 1717, subdivision (a) provides in part: “In any action on a contract, where the contract specifically provides that attorney’s fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney’s fees in addition to other costs.” Section 1717, subdivision (b)(2) provides, however, that “[w]here an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this

section.” Section 1717, subdivision (b) “is based on *public policy to encourage* plaintiffs to discontinue nonmeritorious litigation rather than continue in an effort to avoid a fee award.” (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2008) ¶ 11:39, p. 11-24.)

Kato contends plaintiffs did not voluntarily dismiss their claims because they had been unsuccessful in obtaining a preliminary injunction and because evidence had been “obtained and discovery pursued that was very unfavorable” to plaintiffs. “But, as the court explained in *D & J, Inc. v. Ferro Corp.* (1986) 176 Cal.App.3d 1191, 1194 . . . : ‘It is not the stage of the proceedings which distinguishes a voluntary dismissal from an involuntary one. Rather, the key is the plaintiff’s role, if any, in bringing it about.’” (*Marina Glencoe, L.P. v. Neue Sentimental Film AG* (2008) 168 Cal.App.4th 874, 877.) Civil Code section 1717, subdivision (b)(2)’s provision “‘there shall be no prevailing party for purposes of this section’ when an action has been voluntarily dismissed has been broadly applied.” (Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 11:39.2, p. 11-25 [noting the “[s]tage of proceedings not determinative”].) “Any dismissal entered on *plaintiff’s motion or request* or on stipulation of the parties, before or during trial, is ‘voluntary’ within the meaning of [Civil Code section] 1717 . . . and prevents a fee award.” (*Id.*, ¶ 11.39.4, p. 11-25.) The dismissal here was entered at plaintiffs’ request and thus was voluntary. (*Ibid.*)

Kato next argues plaintiffs’ claims were not actions on a contract within the meaning of Civil Code section 1717, subdivision (a). We disagree. “In determining whether an action is ‘on the contract’ under section 1717, the proper focus is not on the nature of the remedy, but on the basis of the cause of action.” (*Kachlon v. Markowitz* (2008) 168 Cal.App.4th 316, 347.)

In *Exxess Electronix v. Heger Realty Corp.* (1998) 64 Cal.App.4th 698, 707, the appellate court held: “In its claim for declaratory relief, Exxess requested that the trial court determine the parties’ rights and duties under the lease. Such a claim is ‘on

a contract' for purposes of [Civil Code] section 1717. [Citations.] Accordingly, section 1717 governs whether attorneys' fees can be awarded on the claim for declaratory relief." (See also *Kachlon v. Markowitz*, *supra*, 168 Cal.App.4th at p. 348 [""Actions for a declaration of rights based upon an agreement are "on the contract" within the meaning of Civil Code section 1717""].)

Here, plaintiffs' declaratory relief claim sought a determination of the parties' rights and duties under the agreements, alleging: "An actual controversy has arisen and now exists between Plaintiffs and KATO, in that Plaintiffs contend that KATO is not entitled to any further compensation or reimbursement under either of the Independent Contractor Agreements. Plaintiffs are informed and believe and on that basis allege that KATO disputes this contention, and contends to the contrary that he is entitled to certain additional monies. In addition, KATO contends that the Independent Contractor Agreements are unenforceable, or otherwise not binding. Plaintiffs dispute this contention, and maintain that the Independent Contractor Agreements, including the Contractor Confidentiality Policies associated therewith, are valid and enforceable, and that KATO is barred from disclosing any of the matters mentioned therein." The complaint further alleged, "[p]laintiffs desire a determination of their rights and duties, and a declaration as to whether KATO is entitled to additional monies from [plaintiffs] under the Independent Contract[or] Agreements or otherwise; that the Independent Contractor Agreements, including the Contractor Confidentiality Policies associated therewith, are valid and enforceable; and that KATO is barred from disclosing any of the matters mentioned therein." Plaintiffs' declaratory relief claim is therefore "on the contract" within the meaning of Civil Code section 1717, subdivision (b).<sup>2</sup>

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<sup>2</sup> Kato argues plaintiffs' declaratory relief claim is not an action on the contract because the complaint alleged plaintiffs sought a declaration as to whether Kato was entitled to additional monies under the agreements "or otherwise." As discussed *ante*, plaintiffs' declaratory relief claim was entirely based on the agreements. The complaint also alleged Kato had taken the position the agreements were unenforceable or otherwise

As to whether injunctive relief claims are actions on the contract under Civil Code section 1717, in *Kachlon v. Markowitz, supra*, 168 Cal.App.4th at page 348, the appellate court held that an injunctive relief claim was an action on the contract within the meaning of Civil Code section 1717, subdivision (a). The appellate court reasoned: “‘Actions seeking injunctive relief are, of course, equitable in nature. Although most arise out of torts . . . , injunctions are occasionally granted in contract actions.’ [Citation.] Here, the basis of the [plaintiffs]’ claim for an injunction was, in part, contractual in nature: namely, that foreclosure violated the terms of the trust deed.” (*Kachlon v. Markowitz, supra*, 168 Cal.App.4th at p. 348.)

Here, the complaint alleged, “[o]n numerous occasions, continuing through the present date, KATO has threatened to disclose publicly certain sensitive private alleged facts . . . which he had expressly promised to keep private. KATO has refused and still refuses to refrain from making and continuing these threats.” The complaint stated: “KATO’s wrongful conduct by issuing these threats, and his threatened disclosure of the aforementioned sensitive private alleged facts, will cause great an[d] irreparable injury to Plaintiffs . . . and . . . [will] cause grave harm to Plaintiffs’ reputation and goodwill.” The complaint also stated: “Plaintiffs have no adequate remedy at law, in that the anticipated loss to Plaintiffs’ reputation and goodwill which KATO will cause if not enjoined would not be fully compensated by pecuniary compensation, which in any event would be extremely difficult to calculate.” The complaint further stated plaintiffs sought the “issuance of a temporary restraining order, preliminary injunction, and permanent injunction restraining and enjoining KENJI KATO from disclosing the matters covered by the Contractor Confidentiality Policies contained in each of the Independent

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nonbinding. That the complaint sought a declaration as to whether, inter alia, Kato was entitled to additional payment under the agreements “or otherwise” does not change the character of plaintiffs’ declaratory relief claim to anything other than one “on the contract.”



Contractor Agreements.” Plaintiffs’ claim for injunctive relief sought to enjoin Kato from disclosing confidential matters pursuant to the agreements. Thus, plaintiffs’ claim for injunctive relief also is an “action on the contract.”

Thus, the trial court properly concluded prevailing party attorney fees were not available to Kato pursuant to Civil Code section 1717, subdivision (b)(2).

Kato contends that he was entitled to prevailing party attorney fees under Code of Civil Procedure sections 1021 and 1032. Code of Civil Procedure section 1021 provides: “Except as attorney’s fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided.” Section 1032, subdivision (a)(4) includes in the definition of the term “prevailing party” a “defendant in whose favor a dismissal is entered.” Section 1033.5, subdivision (a)(10) provides that attorney fees are allowable as costs under section 1032 “when authorized by any of the following: [¶] (A) Contract. [¶] (B) Statute. [¶] (C) Law.” As discussed *ante*, Kato was not entitled to prevailing party attorney fees under the agreements by operation of Civil Code section 1717, subdivision (b)(2). Kato has not identified any applicable statute or other law which entitles him to prevailing party attorney fees in this case. The trial court did not err by denying Kato’s motion for prevailing party attorney fees.

## II.

### *The Trial Court Erred by Failing to Award Kato Costs (Not Including Attorney Fees).*

The trial court denied Kato’s motion to recover costs under Civil Code section 1717, subdivision (b)(2), and added, “[t]he court further finds that it is not entirely clear that the court even has jurisdiction to rule on this motion given that the court previously granted plaintiff’s motion to compel arbitration and stay proceedings.”

Code of Civil Procedure section 1032, subdivision (b) provides: “Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.” Again, such costs include attorney fees only when authorized by contract, statute, or law—which, as discussed *ante*, is not the case here. (See *Santisas v. Goodin* (1998) 17 Cal.4th 599, 606 [“recoverable litigation costs do include attorney fees, but only when the party entitled to costs has a legal basis, independent of the cost statutes and grounded in an agreement, statute, or other law, upon which to claim recovery of attorney fees”].) Subdivision (a)(4) of section 1032 defines the term “prevailing party” as including “a defendant in whose favor a dismissal is entered.”

Plaintiffs did not oppose Kato’s request for an award of costs (not including attorney fees) in the trial court, and do not oppose Kato’s pursuit of such costs on appeal. In the respondents’ brief, plaintiffs state: “Plaintiffs, in their Opposition to the Motion for Fees, did not contest Kato’s request for costs other than attorney’s fees. Neither do Plaintiffs, in this Brief, address that issue; however, it is possible that Kato may have had a plausible claim to recover costs (other than attorney’s fees) pursuant to Code of Civil Procedure Section 1032.”

The trial court expressed its uncertainty whether it had jurisdiction to award court costs to Kato in light of its order compelling the matter to binding arbitration. Neither party argues the trial court lacked such jurisdiction to award Kato court costs, or cites any legal authority on this issue. Kato sought costs after plaintiffs voluntarily dismissed the entire Orange County action while discovery was in progress and before the arbitration itself had occurred. Under the circumstances, we conclude Kato was entitled to court costs under Code of Civil Procedure section 1032, subdivision (b).

DISPOSITION

Let a peremptory writ of mandate issue, directing the trial court to vacate its order denying Kato his costs and to make an order awarding Kato costs, not including attorney fees. In all other respects, the petition is denied. In the interests of justice, neither party shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

ARONSON, J.